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Subject: Docket No. 060636 - Sierra's Response to Motion to Strike
Attachments: Sierra req for oral arg.doc; Sierra response to motion to strike testimony - exh.doc

ORIGINAL

Enclosed please find the Sierra Club, Inc., John Hedrick and Brian Lupiani's Response in Opposition to Applicants' Motion to Strike, and a Request for Oral Argument

Leon Jacobs

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December 27, 2006

Blanca Bayo
Director, Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, Florida 32399-0850

RE: Docket No. 060635-EU,
Petition for determination of need for Electrical power plant in Taylor County
By Florida Municipal Power Agency, JEA, Reedy Creek Improvement District,
and City of Tallahassee.

Dear Ms. Bayo:

On behalf of the Sierra Club, Inc., John Hedrick and Bruce Lupiani, I have enclosed a Response In Opposition to Applicants' Motion to Strike Portions of Testimony and Exhibits, consisting of eight (8) pages. I thank you for your attention to this matter.

Sincerely,

/s/ E. Leon Jacobs, Jr.

E. Leon Jacobs, Jr.
Attorney for The Sierra Club, John Hedrick and Brian Lupiani

Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for determination of need for)
Electrical power plant in Taylor County by)
Florida Municipal Power Agency, JEA, Reedy)
Creek Improvement District, and City of)
Tallahassee.)
_____)

DOCKET NO.: 060635 EU

DATED: DECEMBER 27, 2006

THE SIERRA CLUB, INC., JOHN HEDRICK, AND BRIAN LUPIANI'S RESPONSE
IN OPPOSITION TO APPLICANT'S MOTION TO STRIKE PORTIONS OF
TESTIMONY AND EXHIBITS FILED BY
THE SIERRA CLUB, INC., JOHN HEDRICK, AND BRIAN LUPIANI

Petitioners The Sierra Club, John Hedrick, Barry and Brian Lupiani ("Petitioners"), by and through their undersigned counsel, pursuant to Rule 28-106.201(1), Florida Administrative Code, and the ruling of Prehearing Officer Katrina Tew at the Prehearing Conference on December 21, 2006, file this Response In Opposition to Applicants' Motion to Strike Portions of Testimony and Exhibits Filed by The Sierra Club, John Hedrick, Barry and Brian Lupiani, and states as follows:

1. On November 2, 2006, The Sierra Club, John Hedrick, Barry and Brian Lupiani prefiled the testimony of Hale Powell in these proceedings.

2. On December 20, 2006, Applicants filed a Motion to Strike Portions of Testimony and Exhibits submitted by Mr. Powell on behalf of The Sierra Club, John Hedrick, and Brian Lupiani, and submitted a series of arguments in support of their motion. Applicants assert that: (i) evidence submitted by Mr. Powell is outside of the Florida Public Service Commission's ("FPSC" or "Commission") jurisdiction; (ii) that evidence regarding carbon regulation is not within the scope of issues in this proceeding; (iii) that Mr. Powell's testimony refers to and relies on materials which were not authored by him, and thus are hearsay; (iv) that Mr. Powell has submitted evidence regarding matters in which he has no expertise; and (v) Mr. Powell's

testimony raises issues relating to demand-side management that are not relevant in these proceedings.

ARGUMENT 1: EVIDENCE REGARDING ENVIRONMENTAL COMPLIANCE IS CLEARLY WITHIN COMMISSION JURISDICTION

3. Applicants assert that the Commission is without jurisdiction to consider or assess environmental or natural resource impacts of constructing new electric generating facilities. [App. Motion to Strike at 3] The Commission's authority is found in section 403.519, Florida Statutes, which states in pertinent part:

In making its determination [of need], the commission shall take into account the need for electric system reliability and integrity, the need for adequate electricity at a reasonable cost, the need for fuel diversity and supply reliability, and whether the proposed plant is the most cost-effective alternative available. The commission shall also expressly consider the ~~conservation measures taken by or reasonably available to the applicant or its members~~ which might mitigate the need for the proposed plant and other matters within its jurisdiction which it deems relevant.

4. The Commission has implemented this statutory authority in a series of administrative rules, most specifically Rules 25-22.080, 25-22.081 and 25-22.082, Florida Administrative Code ("FAC"), which clearly establish jurisdiction relating to system reliability and integrity, reasonableness of electricity costs, fuel diversity, fuel supply reliability, and the cost effectiveness of the various options considered to address the electric demand which the proposed plant is intended to meet. Subsection 1 of Rule 25-22.082 declares the scope and intent of that rule and provides:

The intent of this rule is to provide the Commission information to evaluate a public utility's decision regarding the addition of generating capacity pursuant to Section 403.519, Florida Statutes. The use of a Request for Proposals (RFP) process is an appropriate means to ensure that a public utility's selection of a proposed generation addition is the most cost-effective alternative available.

5. In order to comply with Rule 25-22.082, the Commission required Applicants to identify the technical details of the next generating unit addition planned for certification under section 403.519. This establishes not only a guidepost for the bidding process, but also a proxy for the

need determination. In subsection 5 of Rule 25-22.082, the Commission required the Applicants to determine and communicate to all potential vendors specific data relating to this next unit, including *a discussion of actions necessary to comply with environmental requirements (associated with this unit), and a summary of all major assumptions used in developing these[sic] estimates.* [emphasis added] This requirement acknowledges the fundamental, economic, and political fact that building of electric power plants, especially coal-fired plants, will subject the owners to environmental regulations, and prudent due diligence requires that those requirements be understood and accounted for in the planning process.

Every vendor that responded to the RFP process conducted by Applicants was required in 25-22.082(5)(d) to demonstrate how its proposal would ensure environmental compliance by the Applicants should that bid be accepted.

6. The Commission has firmly established its jurisdiction in the need determination process to conduct oversight over environmental regulatory compliance issues raised by the planned capacity additions by the Applicants. The Commission's rule completely rejects Applicants assertions that nothing gives the Commission this authority. [App. Motion to Strike at 7] Applicants have submitted an extensive body of data, a part of which indicates their compliance with these RFP requirements, and nothing showing their objection to the Commission's jurisdiction to consider environmental issues in the RFP process. They cannot be heard to contest that jurisdiction now.

7. The Commission has actively exercised its oversight jurisdiction to consider whether ratepayers bear an unreasonable burden of environmental compliance costs imposed by new capacity additions. The Response of the National Resource Defense Council ("NRDC") to Applicants' Motion To Strike Portions of Testimony and Exhibits provides a detailed and skilled analysis of the decision law by the Commission on this point. [NRDC Response Motion to Strike at pp. 5] The analysis of NRDC is hereby adopted and incorporated by reference by the Sierra Club.

8. The testimony of Mr. Powell focuses primarily on the economic features of demand-side management (DSM), and makes only cursory reference to the environmental impacts of DSM measures. In no instance are these references intended as proof of the environmental impacts of a coal-fired electric power plant. Thus, it is questionable if these statements meet the formal definition of evidence as used here. Alternatively, these references occur in the context of promoting DSM as a cost-effective alternative to a coal-fired plant. They are pertinent because a new coal-fired plant will incur costs to comply with environmental regulations. The Sierra Club takes the position that an integrated portfolio which includes DSM defers or obviates the obligation for environmental costs, and asserts that all testimony related to this position is relevant in the determination of need, and should not be stricken.

9. The Commission has traditionally asserted broad discretion in its review of need determinations and cost-effectiveness, by addressing a host of dynamic issues in its analysis.¹ Nothing in this record, and nothing offered by Applicants indicates that the Commission should narrow its discretion in this docket. It would seem particularly unusual to restrict the Commission's inquiry and analysis on such a vital issue as air quality, which profoundly affects the development of coal plants, at a time when the Commission will determine the certification of a new wave of coal plants after many years where no coal plants were built in the state.

¹ In re Petition for Determination of Need for the Osprey Energy Center in Polk County by Seminole Electric Cooperative and Calpine Construction Finance Company, L.P., 01 F.P.S.C. 2:443, 446 (2001) (PSC certified a 529-megawatt combined cycle exempt wholesale generation plant in 2003 when only 350 megawatts was contractually committed to provide 88 megawatts of the retail needs of Seminole Electric Cooperative in 2004); In re Petition to Determine Need for Proposed Electrical Power Plant in St. Marks, Wakulla County, by City of Tallahassee, No. 961512EM (June 9, 1997) (order no. PSC-97-0659-FOF-EM) (explaining that the PSC has previously recognized that "it is not unusual for a utility to grow into the capacity of a large generating unit"); In re Petition to Determine Need for Proposed Capital Expansion Project of the Dade County Resources Recovery Facility, an Existing Solid Waste Facility, by Metropolitan Dade County, 93 F.P.S.C. 11:375, 381 (1993) ("Although the expanded facility will not contribute to the reliability and integrity of the state's electric system, the energy is cost-effective and will displace fossil fuels."); In re JEA/FPL's Application of Need for St. John's River Power Park Units 1 and 2 and Related Facilities, 81 F.P.S.C. 6:220, 221-22 (1981) ("We construe the 'need for power' issue to encompass several aspects of need . . . the electrical need for additional capacity . . . the economic need of providing this bulk power and energy at the lowest possible cost . . . the socioeconomic need of reducing the consumption of imported oil in the State . . ."); In re Petition for Certification of Need for Orlando Utilities Commission, Curtis H. Stanton Energy Center Unit 1, and Related Facilities, 81 F.P.S.C. 10:18 (1981) (PSC approved 415-megawatt coal plant that was not needed for reliability purposes by any utility involved in the application until 1991, which was five years after the in-service date of the plant).

ARGUMENT 2: REGULATION OF CO2 EMISSIONS FROM TEC IS EXTREMELY RELEVANT, AS THE PREHEARING OFFICER HAS RULED, AND AS APPLICANTS CONFIRM BY THEIR SUBMISSION OF ANALYSES PROJECTING SUCH REGULATION

10. At the December 21, 2006, Prehearing Conference, Prehearing Officer Katrina Tew ruled to include a specific issue (Issue 5) which legitimizes all evidence submitted to demonstrate the scope and content of CO2 regulation the Applicants are likely to face, as well as the costs that regulation will impose. Applicants' motion to strike as to this issue is muted by the Prehearing Officer's ruling, and the testimony should not be stricken.

11. The Commission has the jurisdiction and has exercised its discretion to conduct oversight over the impact of transitory air quality regulations in the need determination process. Applicants acknowledge this jurisdiction by their submission of sensitivity analyses projecting the economic impact of CO2 regulation for TEC.

12. The essence of Applicants' Motion to Strike on this issue is not that the Commission is restricted from considering this evidence, but rather that the Applicants should have the only word in resolving the issue.

ARGUMENT 3: STATEMENTS BY MR.. POWELL WHICH MEET THE DEFINITION OF "HEARSAY" ARE ADMISSABLE IN A HEARING CONDUCTED PURSUANT TO SECTION 120.57, FLORIDA STATUTES, SUBJECT TO CONDITIONS WHICH ARE MET IN THIS PROCEEDING

13. In administrative hearings under Chapter 120, F.S., "hearsay evidence, whether received into evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient by itself to support a finding." Rule 28-106.213(3), Florida Administrative Code. For this reason, the courts have required that the entire record be reviewed before rejecting a finding as unsupported by competent, substantial evidence. See: *Pasco County School Board v. FPERC*, 353 So.2d 108, 120-21 (Fla. 1st DCA 1977); *Sunshine Chevrolet Oldsmobile v. Unemployment Appeals Committee*, 910 So.2d 948 (Fla. 2d DCA 2005).

14. Each of the materials cited by Applicants in Mr. Powell's testimony are reference materials which describe case studies, or report policy positions regarding the economic potential of DSM. They are not the sole, or even the primary basis of his opinion on the cost effectiveness of TEC. As he stated in his deposition, the basis of Mr. Powell's opinions in this proceeding is his professional experience in analyzing DSM portfolios, and his education in the Master of Science in Energy Management and Policy. Because DSM measures have very similar designs and are functionally equivalent across jurisdictions, it is reasonable to rely on reference materials from other jurisdictions.

15. The Sierra Club hereby adopts and incorporates by reference the arguments of NRDC [NRDC Response to Motion to Strike at pp. 16] that these documents and materials do not have to be prepared by Mr. Powell, or under his direct supervision as the Applicants argue. The documents and materials must be relevant to the issue upon which the opinion is offered and of such a nature reasonably relied upon by other experts in the field. None of the evidence or materials cited by Applicants should be stricken from Mr. Powell's testimony

ARGUMENT 4: MR.. POWELL'S EXPERTISE REGARDING DSM PROGRAMS OFFERS ANECTODOTAL EVIDENCE TO SUPPORT THE STATEMENT REGARDING RESPIRATORY IMPACTS

16. Mr. Powell's professional experience in the operation of DSM programs allows him to rely on anecdotal evidence of the impacts of DSM programs on a variety of levels, including the overall reduction of emissions from electric plants which results from successful implementation, which in turn reduces green house gases, producing better air quality and better respiratory conditions.

ARGUMENT 5: THE ECONOMIC BENEFITS OF DSM ARE CENTRAL TO THE COST EFFECTIVE ANALYSIS IN THIS PROCEEDING

17. Section 403.519 expressly requires an evaluation by the Commission of conservation and other resources available to Applicants that might mitigate the need for the proposed coal-fired

plant. DSM is just such a resource. Applicants assert that Mr. Powell fails to specifically demonstrate and model DSM measures that would be appropriate for the Applicants. To the contrary, Mr. Powell has cited a vast catalog of DSM measures implemented by one of the largest public utilities in the nation. Mr. Powell has further cited results from other jurisdictions which support the projected impact for TEC Applicants. Most specifically, Mr. Powell has assessed the analysis conducted by the City of Tallahassee, which establishes a clear standard for which DSM measures offer economic benefits for the remaining Applicants. Under the timeframes and limitations of these proceedings, it would be impractical for Mr. Powell to model these measures specifically for TEC Applicants. However, the similarity in design and functionality are such that Mr. Powell can adequately form an opinion on the projected impact of these measures. This is exactly the process by which Applicants form projections that support a host of other projections in the Petition for Determination of Need.

18. In the determination of need process, the economic impact of DSM is relevant to the level of operating & maintenance costs of the plant, to the ability of the Applicants to comply with environmental regulations, to the mitigation of the building of new capacity and to the level of environmental compliance costs. Applicants hold the burden to show that they have fully evaluated their options and presented the Commission with their least-cost alternative. In fact, Rule 25-22.082(10) requires the Applicants to seek innovative technologies and alternatives from potential vendors during the RFP process to meet the capacity needs. The Sierra Club does not have a burden to demonstrate every least cost alternative to TEC.

19. The evidence presented by the Sierra Club is probative of the cost effectiveness of TEC, and places the host of issues surrounding this point in dispute. It should not be stricken.

WHEREFORE, for the reasons stated herein, The Sierra Club, Inc., John Hedrick, and Brian Lupiani request that the Commission deny Applicants' Motion to Strike.

Respectfully submitted this 27th day of December, 2006.

Certificate of Service

I certify that a copy of this Response to Applicants' Motion to Strike Portions of Testimony and Exhibits in Docket No. 060635-EU was provided this 27th day of December, 2006, by electronic service to the following:

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